Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

May Term, 1978

No. 77-1585

WALTER LEE STEPHENSON and
KATIE CHARLOTTE STEPHENSON - - Petitioner

versus

UNITED STATES OF AMERICA - - Respondent

PETITION FOR A WRIT OF CERTIONARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The trial court erred by not suppressing evidence which was a product of an illegal and unconstitutional search and seizure.

The trial court committed prejudicial error when it failed to offer defendant's recommended instructions that, in order for the defendant to be found guilty of possession of a firearm under 18 U.S.C. App. 1202 (A), possession had to be within the knowledge of the defendant.

The trial court erred by sentencing the defendant, Walter Lee Stephenson, as a dangerous special offender under 18 U.S.C. 3575 when the defendant did not receive notice a reasonable time before trial as required by the statute.

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IN THE

SUPREME COURT OF THE UNITED STATES

May Term, 1978

No. _____

WALTER LEE STEPHENSON and
KATIE CHARLOTTE STEPHENSON - - *Petitioner*

v.

UNITED STATES OF AMERICA - - *Respondent*

PETITION FOR A WRIT OF CERTIONARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Walter Lee and Katie Charlotte Stephenson, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINION BELOW

The District Court for the Western District of Kentucky found the defendants guilty on a jury verdict without written opinion. The opinion of the Circuit Court of Appeals, printed in Appendix A hereto, *infra,* has not yet been reported.

JURISDICTION

The opinion of the Court of Appeals was entered on February 24, 1978. Petitioner's petition for rehearing, timely filed, was denied on March 22, 1978. (Appendix B, *infra.*) A motion requesting an extension of time within which to petition for certiorari is pending before this court. The jurisdiction of this court is invoked pursuant to 28 U.S.C. 1254 (1) and Rule 22.2 of the Rules of this Court.

QUESTIONS PRESENTED

1. Did the trial court err by not suppressing evidence which was a product of an illegal and unconstitutional search and seizure?

2. Did the trial court commit prejudicial error when it failed to offer defendant's recommended instruction that, in order for the defendant to be found guilty of possession of a firearm under 18 U.S.C. APP. 1202 (A), possession had to be within the knowledge of the defendant?

3. Did the trial court err by sentencing the defendant, Walter Lee Stephenson as a dangerous special offender under 18 U.S.C. 3575 when the defendant received notice a few hours before trial and not at a reasonable time prior to trial as required by the statute?

STATUTES INVOLVED

18 U.S.C. appendix Section 1202 (A) provides as follows:

> (a) Any person who—
>
> (1) Has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, or . . .
>
> and who receives, possessed, or transports in commerce or affecting commerce, after the date of enactment of this act, any firearm shall be fined not more than $10,000, or imprisoned for not more than two years or both.

18 U.S.C. Section 3575 (A) and (E) provides as follows:

> (A) Whenever an attorney charged with the prosecution of a defendant in a court of the United States for an alleged felony . . . believes that the defendant is a dangerous special offender such attorney, a reasonable time before trial or acceptance by the court of a plea of guilty or nolo contendre, may sign and file with the court, and may amend, a notice . . .

STATEMENT OF THE CASE

On February 11, 1977, Mr. and Mrs. Walter Lee Stephenson, Defendants, herein, were arrested by the Louisville Division of Police and charged with violating Title 18 U.S.C. Appendix, Section 1202 (A)(1). Probable cause was established at a Preliminary Hearing conducted on April 15, 1977, and both Defendants

duly filed a motion requesting the court to suppress all evidence seized as a result of an illegal and unconstitutional search of defendants' home. On June 1, 1977, at a hearing before the Honorable Rhodes Bratcher, United States District Judge, deceased, the motion to suppress the evidence was overruled and a trial by jury immediately was conducted. A few hours prior to trial, James H. Barr, Esquire, Assistant United States Attorney, served a notice on Walter Lee Stephenson that he was electing to proceed under 18 U.S.C. 3575, the Special Dangerous Offender Statute.

On June 2, 1977, the jury rendered a verdict finding both defendants guilty of violating Title 18, Appendix, Section 1202 (A)(1), United States Code, They hereby appeal that verdict. Furthermore, Walter Lee Stephenson also appeals from the judgment entered June 24, 1977, wherein the Honorable Rhodes Bratcher found him to be a Special Dangerous Offender, pursuant to 18 U.S.C. 3575. On June 24, 1977, Walter Lee Stephenson was sentenced to two (2) years on the single count of violating Title 18, Appendix, Section 1202 (A)(1) and an additional five (5) years for violating 18 U.S.C. 4575, the Special Dangerous Offender statute, to be served consecutive to the two (2) year term for a total of seven (7) years. Katie Charlotte Stephenson was sentenced to two (2) years for the single count, violation of Title 18, Appendix, Section 1202 (A)(1).

The Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court on February 24, 1978. Petition for Rehearing was denied on March 22, 1978.

STATEMENT OF THE FACTS

A. Pre-Trial

Walter Lee and Katie Charlotte Stephenson reside, as husband and wife, at 2500 Kentucky Street, Louisville, Jefferson County, Kentucky. The Defendant, Walter Stephenson, has lived on that street for approximately eleven (11) years. Both defendants were secure in their residence, on *February 11, 1977,* when a search was conducted by law enforcement officers, employed by the City of Louisville. The officers acted under authority of a search warrant issued to them the previous day, *February 10, 1977,* by the Honorable S. Rush Nicholson, Jefferson County Circuit Judge.

Judge Nicholson's decision as to whether there existed probable cause for issuance of the search warrant was predicated solely on an affidavit prepared and typed by Detective William Greer, City of Louisville Division of Police.

In the affidavit, necessary to support issuance of the search warrant, the law enforcement officer stated that he had received information from a reliable, confidential informer on *January 9, 1977,* at 1630 hours. At the hearing on the Motion to Suppress, Officer Greer, intending to correct the defect, stated that the date in the affidavit was an error. He said that the informant actually called him on February 9, not January 9, as stated in the affidavit.

During the search, a Smith and Wesson, Model 37, .38 caliber revolver bearing the serial number 600614 was found in the bedroom, in Katie Stephenson's

dresser drawer. There was also testimony at trial that "narcotics and drugs" were also discovered in the defendants' residence. However, the Government did not produce these items nor did it produce or refer to any laboratory reports on the discovered substances.

The confiscation of the weapon resulted in an action by the plaintiff, United States of America, charging the defendants with a violation of Title 18, U.S.C. Appendix, Section 1202 (A)(1), Unlawful Possession of a Firearm.

The defendant moved to suppress the evidence alleging the facts in the affidavit, as stated, were stale and too remote in time, being thirty-two (32) days old when the search warrant was issued. A motion to suppress the evidence accompanied by a memorandum in support was tendered on May 18, 1977. On June 1, 1977, a hearing was held, and this motion to suppress was overruled.

On the morning of the trial, June 1, 1977, the Government issued a Notice to defendant, Water Lee Stephenson of its intention to proceed under Title 18, U.S.C. 3575, charging the defendant as a Special Dangerous Offender which carries a maximum sentence of twenty-five (25) years.

B. The Sentencing Hearing

It was introduced by the government at the Sentencing Hearing, conducted on June 24, 1977, that defendant, Walter Lee Stephenson, was convicted on June 24, 1965, in the Circuit Court of Jefferson County, Kentucky, of Storehouse Breaking and received a probated sentence of one year and one day. On October

11, 1965, defendant was convicted in the United States District Court for the Western District of Kentucky for Theft from Interstate Shipment and received a sentence of one year and one day. Defendant was paroled on July 31, 1966. Defendant pleaded guilty to Malicious Shooting and Wounding and was sentenced to five years in prison on November 19, 1970. The victim in this case was shot one time and three people went to prison for it. Defendant was released from prison on December 22, 1972.

Prior to the Sentencing Hearing, defense counsel moved to strike the Notice on grounds that the Notice tendered the morning of the trial was untimely and failed to meet the statutory requirements under Title 18, Section 3575 (A).

REASON FOR GRANTING THE WRIT

Proceeding by use of a Search Warrant is drastic. Its abuse led to the adoption of the Fourth Amendment of the Constitution of the United States. The law is well established that probable cause to justify the issuance of a search warrant must exist at the time the warrant is issued. In the instant case, the law enforcement officer did not act promptly on the information he received from his informer. He waited thirty-two (32) days to obtain a warrant. In essence, by using this aged information he obtained and performed a search of defendant's premises without probable cause.

Courts have traditionally spoken in terms of nearness of remoteness in time when deciding the validity

of a search warrant. In *Schoeneman* v. *United States*, 317 F. 2d 173 (D.C. 1963), the Court stated "we could find no cases which sustained a search warrant issued more than 30 days after finding of the evidence which constituted the basis for the search." Earlier, the Supreme Court stated that the crucial issue was whether the affiant had reasonable grounds at the time of his affidavit and the issuance of the warrant for the belief that the law was violated, at that time, on the premises to be searched. *Dumbar* v. *United States*, 403 F. 2d at 193 (9th Cir. 1968). In determining whether probable cause exists, the court "is not required to determine whether the offense charged has in fact been committed, but it is concerned with the question of whether there is reasonable grounds to believe at the time of the affidavit that the law was being violated on the premises to be searched." *United States* v. *Besase*, 521 F. 2d 1306 (6th Cir. 1975).

In the present situation, the facts upon which the law enforcement officer relied were stable, remote and unrelated to the facts at the time of the issuance of the warrant. In *Sgro* v. *United States*, 287 U. S. 206 at 211 (1932), the Supreme Court, although dealing with a statute prescribing the time limitation for an affidavit, made clear the relationship between the timeliness of an affidavit and a finding of probable cause. "While the statute does not fix the time within which proof of probable cause must be taken by the judge or commissioner, it is manifest that the proof must be of facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time."

In *Neal* v. *Commonwealth*, 292 S. W. 2d 14 (Ky. 1927), the Court said, "it is the rule in this jurisdiction that the affidavit supporting a search warrant must contain a statement of facts showing the source of the information which must be of such recent occurrence as to create a probable cause for the belief that the forbidden articles were possessed at the time the search was made."

In *United States* v. *Harris*, 482 F. 2d 1115 (3rd Cir. 1973), the Court stated that "the question of staleness of probable cause depends more on the nature of the unlawful activity alleged in the affidavit than the dates and times specified therein." Whether the facts alleged in the affidavit were stale and/or too remote in time to justify probable cause cannot be qualified by simply counting the number of days between the occurrence of the facts relied upon and the issuance of the affidavit. "Where the affidavit recites a mere isolated violation, it would not be unreasonable to imply that probable cause dwindles rather quickly with the passage of time, however, where the affidavit properly recites facts indicating activity of a protracted and continuous nature, a course of conduct, the passage of time becomes less significant." *United States* v. *Johnson*, 461 F. 2d 285 (10th Cir. 1972). The affidavit in the instant case was based on activity which was not of a protracted nature, nor was the activity recited in the affidavit a course of conduct, or continuous. Thus, the passage of thirty-two (32) days mitigates the possibility that the violation still existed and completely erodes all probable cause for the unreasonable search of the defendant's premises.

It is well established that "whether or not the affidavit is sufficient must be determined by what appears on its face," and the courts cannot go behind the affidavit for the purpose of testing its sufficiency. *Thornton* v. *Commonwealth,* 53 S. W. 2d 606, (Ky., 1932). The requirement is fundamental and the "facts must show that the property was known to be at the place to be searched so recently as to justify the belief that the property is still there at the time of the issuance of the search warrant." *Manual For United States Commissioners,* p. 24. "Probable cause must be determined as of the time the warrant is issued and not with the benefit of hindsight." *Giondenello* v. *United States,* 78 S. Ct. 1245 (1958).

The Fourth Amendment requires probable cause. The error in the instant case is flagrantly obvious: a search warrant was issued which was solely predicated upon an affidavit based upon stale and remote facts which were insufficient to establish probable cause. The Supreme Court has held since *Aguilar* v. *Texas,* 378 U. S. 108 (1964), that the inference of probable cause drawn by a magistrate must rest on specific facts. Because of the staleness and remoteness of the information of this informant, no "specific" facts existed upon which probable cause could be based. "In the absence of such empirically demonstratable facts, the magistrate may not exercise the inference-drawing function since the sole input of information is the officer's conclusion. The police officer is therefore undertaking the inference-drawing process reserved to the magistrate. From what is supposed to be an independent, critical evaluation of the circumstances, the

magistrate's probable cause finding diminishes to nothing more than a rubber stamp approval of the conclusions of the officer." 19 *UCLA Law Review,* 96 at 101: *United States* v. *Ventresca,* 380 U. S. 102, 106 (1965), quoting *Johnson* v. *United States,* 333 U. S. 10, 13-14, (1948).

Officer Greer, who obtained the search warrant in question stated, during the hearing on the motion to suppress, "after I receive the information from the informant, we try not to go over 24 hours before we type the warrants and try to serve them. Sometimes the people are not home, we have to go a day or two. But the search warrant is 99 percent of the time typed and signed by the judge within 24 hours after we receive the information." Thus, the officer obtaining the search warrant supports defendants' contention that thirty-two (32) days is too remote to justify probable cause.

To support this stale information, the prosecution in a response to a Motion to Suppress, contended that the dates in the affidavit were erroneous; they called it oversight or a clerical error. In support of their contention, they cited two cases during the hearing on the motion to suppress. In the first case, *United States* v. *McKenzie,* 446 F. 2d 949, (6th Cir. 1971), the affidavit was typed on a form wherein the printed date read 1922 instead of 1923. In the second case, *Pera* v. *United States,* 11 F. 2d 772 (9th Cir. 1928), the court considered a typing error where one digit made the date an error. Also, the court stated that no objection was made to the form or sufficiency of the warrant at the

trial. These cases are clearly distinguishable from the instant case.

In the present case the error was not a typographical error; the month was not misspelled; the wrong digit was not typed, but, the police officer swore one date was accurate in his affidavit and, in an effort to rehabilitate this defect, swore at the hearing that he had made a mistake. Exactness as to when he received the confidential information is essential in order for the issuance of the search warrant.

Issuance of a search warrant should not be automatic. The issuing official is required to carefully read, question and understand the facts which support such a drastic invasion of a citizen's home. In *Rooker* v. *Commonwealth,* 508 S. W. 2d (Ky. 1974), the court held, "where a judge issues a search warrant based upon an affidavit which he does not read, he makes no determination of probable cause but merely serves as a rubber stamp for the police. Such action is improper even though the affidavit actually shows probable cause for the issuance of the warrant."

The Supreme Court specifically held in *Whitely* v. *Warden,* 91 S. Ct. 1031 (1971):

> Under the cases of this court an otherwise insufficient affidavit cannot be rehabilitated by testimony concerning information possessed by the affiant when he sought the warrant but not disclosed to the issuing magistrate. A contrary rule would, of course, render the warrant requirement of the Fourth Amendment meaningless.

Thus, in the case at bar, the judicial officer would be a mere rubber stamp if the police officer can, subsequent to the execution of the warrant, amend their facts in the affidavit on which the probable cause rests.

Another recent case supporting defendants' contention is *Roach* v. *Parratt,* 407 F. Supp. 703 (Neb. 1976), in which the Court stated, it is necessary to view the sufficiency of an affidavit in determining the legality of a search warrant. Also, *Harness* v. *Commonwealth,* 475 S. W. 2d 485 (Ky. 1971), declared that, it is improper to go behind allegations of the affidavit in support of the search warrant to establish probable cause.

Henson v. *Commonwealth,* 347 S. W. 2d 546 (Ky. 1961), *State* v. *Joseph,* 337 A. 2d 523 (R.I. 1975), and *Ruth* v. *Commonwealth,* 298 S. W. 2d 300 (Ky. 1958), all hold that the sufficiency of the warrant must be measured by what appears within the "four corners" of the affidavit.

In the present case, the admitted inaccuracy of the facts contained in the supporting affidavits could not support the issuing officer's inference or conclusion that probable cause existed. Thus, the search of defendant's premises was not based upon probable cause, and all evidence seized was in violation of their constitutional rights under the Fourth Amendment of the United States Constitution and should have been duly suppressed by the District Court.

A "Request for Instructions" was timely submitted to the Court by the defense counsel. The instruction which was requested and denied was as follows:

> "To constitute possession of such a firearm, it must be established beyond a reasonable doubt:

(a) That the defendant exercised control, or had the right to exercise control over the firearm, and,

(b) that the defendant had knowledge of the presence of the firearm."

At trial, counsel for the defendant renewed his request for the instruction. This request was denied. The counsel for the defendant cited several cases that supported his requested instruction.

In *United States* v. *Cable,* 466 F. 2d 1007 (8th Cir. 1971), in a proceeding under this same statute, 18 U.S.C.A. App. 1202 (A), the Court stated that the elements of this offense are (1) "The *knowing* and willing (2) possession of a firearm (3) by one previously convicted." (Emphasis added.)

United States v. *Goodiz,* 524 F. 2d 515 (5th Cir. 1975), stated "a necessary element of the receiving crime is that he *knowingly* received a firearm" (Emphasis added). Other cases that held knowledge is an essential element of this offense are: *Rose* v. *United States,* 513 F. 2d 1251 (8th Cir. 1975), *United States* v. *Wiley,* 478 F. 2d 415 (8th Cir. 1973), and *People* v. *Cogwell,* 288 N. E. 2d 729 (Ill. 1972).

None of the Court's instructions adequately provided the jury with the guidance that both defendants must have knowledge of the presence of the firearm in order to be found guilty. An essential part of the case for the defense was that the defendant could not have known the gun was in his house. Thus, by not instructing the jury in regard to the requirement of knowledge, he was prejudiced.

It is specifically required by the Dangerous Special Offender statute, 18 U.S.C. 3575, that: "Whenever an attorney charged with the prosecution . . . has reason to believe that the defendant is a dangerous special offender, such attorney, *a reasonable time before trial* or acceptance of a plea of guilty or nolo contendre *may* sign and *file* with the Court and may amend, a *notice* (Emphasis added)."

In the instant case, the attorney for the government filed his notice with the court and the defendant on the day of trial, June 1, 1977, contrary to the requirement in the statute. This resulted in great and substantial prejudice to the defendant because he prepared for trial on the charge under which he had been arraigned and not for the additional charge. The defendant, who anticipated a maximum two (2) year sentence was suddenly confronted, on the date of his trial, with a possible maximum sentence of twenty-seven (27) years.

The above stated statute specifically states that notice is to be given not just a few hours before trial but "a reasonable time before trial." This was not complied with, and no explanation was offered.

Counsel for the defendant moved the District Court to strike this notice, at the sentencing hearing. This was the earliest possible time for counsel to object to the untimely notice. The statute specifically states:

"In no case shall the fact that the defendant is alleged to be a dangerous special offender be an issue upon the trial of such felony, be disclosed to the jury, or be disclosed before any plea of guilty or nolo contendre or verdict or *finding of guilty to*

the presiding judge without the consent of the parties." (Emphasis added.) 18 U.S.C. 3575 (A) in part.

Thus, counsel for defendant-appellants' objection to the notice was timely and it was a reversible error for the District Court to overrule this objection.

Only a few cases have been decided on the issue of adequate timely notice. These cases support the defendants' position: In *United States* v. *Edwards*, 397 F. Supp. 617 (M.D. Fla. 1974), the court stated that if the government-plaintiff decides to invoke the statute, then he must . . . "do so by filing the notice a reasonable time before trial or acceptance by the court of a plea of guilty or nolo contendre. In this he has no discretion. To accept the contrary suggestion would be to hold that the notice may be filed at any time, and that the provision of the statute just quoted is superfluous or without any meaning at all."

The Court went on to add that *United States* v. *Noland*, 495 F. 2d 529 (5th Cir. 1974), is supportive if not compelling authority for their result. In the case, *United States* v. *Bailey*, 537 F. 2d 845 (5th Cir. 1976), the Court noted, that "prior to pleading, it is essential as a matter of fairness to notify the defendant that he may, under the recidivist statute, receive enhancement of the maximum sentence if he is adjudged to be a 'Dangerous Special Offender.'" (Emphasis added).

At the Hearings on S30 before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Congress, 2nd Session (1970), The Justice Department concluded that a reasonable time before trial was a time

prior to pleading which would permit the defendant as a matter of fairness, to know and understand that he may receive an enhanced sentence.

The procedural requirements of notice under this statute must be strictly followed or the notice shall be held invalid. *United States* v. *Daurdi*, 384 F. Supp. 874 (W.D. Mo. 1974), *United States* v. *Tramunti*, 377 F. Supp. 6 (S.D. N. Y. 1974), both of which involve 21 U.S.C. 849, a drug enhanced-sentencing statute almost identical to the statute in question, 18 U.S.C. 3575.

The defendants' constitutional right of due process has been violated, and the special dangerous offender sentencing should be reversed for the defendant, Walter Lee Stephenson.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 77-5252

UNITED STATES OF AMERICA - - *Plaintiff-Appellee*

v.

WALTER LEE STEPHENSON and
KATIE CHARLOTTE STEPHENSON - *Defendants-Appellants*

ORDER

Before: WEICK, CELEBREZZE, and KEITH, Circuit Judges.

This cause having come on to be considered on the record on appeal, and on the briefs and oral argument of counsel for the parties, the Court being fully advised in the premises concludes that the District Court did not err in instructing the jury on the elements of an offense under 18 U.S.C. App. § 1202 (a)(1), possession of firearms by a convicted felon. The Court further finds that the other claims raised by Appellants are without merit.

It is ORDERED that the judgment of the District Court be, and it hereby is affirmed.

Entered by Order of the Court

Clerk

Issued as Mandate: March 31, 1978
Costs: None

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 77-5252

UNITED STATES OF AMERICA - - *Plaintiff-Appellee*

v.

WALTER LEE STEPHENSON and
KATIE CHARLOTTE STEPHENSON - *Defendants-Appellants*

ORDER

Before: WEICK, CELEBREEZE, and KEITH, Circuit Judges.

Appellants having filed a petition for rehearing with this Court, and this Court having considered said petition and being duly advised in the premises,

It is ORDERED that the petition for rehearing be, and it is hereby denied.

Entered by Order of the Court

Clerk